No. 14-940

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CALIFORNIA, DELAWARE, HAWAI'I, ILLINOIS, INDIANA, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NORTH DAKOTA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

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INTEREST OF *AMICI CURIAE*

Like Texas and every other State, *Amici* States draw state legislative districts that contain approximately equal numbers of residents, based largely on data provided by the U.S. Bureau of the Census's decennial enumeration of total population. States have relied on this total-population model for decades, and have entered into a unique collaboration with the Census Bureau to enhance the accuracy and usefulness of the Census's total-population data for state redistricting.

Appellants seek to upend the States' well-established redistricting practices by asking this Court to declare the States' uniform reliance on total population to be a violation of the Equal Protection Clause. If appellants were to prevail, the States would be forced to abandon a redistricting practice proven through experience to be fair, effective, and administrable. *Amici* States have a strong interest both in preserving their practice of equalizing total population across legislative districts, and in defending the principles of representational government that support this practice.

STATEMENT

A. The States' Convergence on Using Total Population for State Legislative Redistricting

Today, every State uses total population as the starting point for drawing equally populated state legislative districts. See App., Constitutional and Statutory Provisions on Using Total Population for Redistricting. Moreover, to obtain accurate data

about total population, every State works closely with the Census Bureau in a unique and long-running collaboration that provides States with detailed, block-by-block population data based on the Census's decennial "actual Enumeration" of "the whole number of persons in each State," U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2.[1]

Most States (including Illinois, Michigan, and Missouri) have used the Census's total-population count in redistricting for more than a century.[2] However, in the past, some States have drawn legislative districts based on voter registration, citizenship, or another metric.[3] Because the federal Census does not enumerate voters or citizens, these States were required to conduct their own counts of such populations. But as several States discovered, that process proved expensive, unreliable, and vulnerable to partisan manipulation.

For example, from 1821 to 1969, New York redistricted based largely on its own count of U.S. citizens—thus excluding some nonvoters, such as aliens, but including others, such as children.[4] New

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[1] U.S. Bureau of the Census, *2010 Census Redistricting Data (Public Law 94-171) Summary File* A-23, A-26 (2011).

[2] Ill. Const. of 1870, art. IV, §§ 6-8; Mo. Const. of 1875, art. IV, § 7; Mich. Const. of 1909, art. 5, § 4. Prior to *Reynolds v. Sims*, 377 U.S. 533 (1964), some of these States also redistricted based on geographic subdivisions.

[3] N.Y. Citizens' Comm. on Reapportionment, *Report to Governor Nelson A. Rockefeller* ("*N.Y. Report*") 85-91 (1964) (state-by-state compilation).

[4] Ruth C. Silva, *The Population Base for Apportionment of the N.Y. Legislature*, 32 Fordham L. Rev. 1, 6-19 (1963). From 1821 to 1894, New York also excluded poor persons or "persons

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York first conducted its own census to gather citizen counts, but insufficient funding and a lack of well-trained enumerator staff caused "countless errors" in the results.[5] Legislators alleged that partisan manipulation also infected the state-run census because some districts received inflated or depressed citizen counts, which increased or decreased their political power.[6] New York attempted to address these problems by contracting with the federal government to count citizens, but these figures were likewise criticized for being "riddled with inaccuracy" and too costly to obtain.[7] Because of these difficulties, New York amended its constitution in 1969 to redistrict based on the Census's total-population count. N.Y. Const. art. III, § 5-a; *see id.* § 4(a).

Massachusetts experienced similar difficulties. From 1857 to 1970, Massachusetts redistricted based on its own count of potential voters, and from 1970 to 1990 based on its own "census of the inhabitants."[8] Massachusetts relied on each municipality to conduct its own count of voters or inhabitants. But this process resulted in "very uneven" data due to municipal employees' lack of training, ambiguities in

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of color not taxed" from its redistricting base. N.Y. Const. of 1821, art. I, §§ 6-7; N.Y. Const. of 1846, art. III, §§ 4-5.

[5] Silva, *supra*, at 11.

[6] *See* 3 N.Y. Const. Convention, *Revised Record of the Constitutional Convention of the State of New York*, May 8, 1984 to September 29, 1894, 1112-13, 1138-40 (1900).

[7] Silva, *supra*, at 13, 15; *see id.* at 12-16.

[8] Mass. Legis. Research Council, *Report Relative to Changing the Size of the House of Representatives & the Census Basis of Legislative Redistricting*, H. Doc. No. 7020, at 316-17 (1973).

state guidelines, and insufficient resources.[9] This decentralized process also created political "conflict[s] of interest" because of the "great temptation" for municipalities "to inflate their counts" for political power.[10] In response to these problems, Massachusetts abolished its state census in 1990 and adopted the Census's enumeration for redistricting.[11]

Tennessee also faced such problems when it redistricted based on "qualified voters" prior to 1966.[12] Tennessee first conducted its own enumeration of voting-age males, but decided in 1901 to rely instead on the federal Census to "'save the expense of an actual enumeration.'"[13] Legislators claimed to have extrapolated the number of "qualified voters" from the Census's total-population count, but the results triggered partisan division as legislators alleged that the redistricting committee "'had no figures showing the qualified voters'" on which to base redistricting.[14] After experiencing these difficulties, Tennessee in 1966 eliminated its constitutional requirement to redistrict based on "qualified voters" and instead used the Census's total-population count.[15]

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[9] *Id.* at 342-43.

[10] *Id.* at 343.

[11] *See* Mass. Const. art. CXVII; Mass. Sec'y of the Commw., *Information for Voters: The Ballot Questions in 1990*, at 2 (1990).

[12] Tenn. Const. of 1870 art. II, §§ 4-6.

[13] Robert H. White, *Legislative Apportionment in Tennessee* 28 (1962) (quoting joint resolution).

[14] *Id.* at 31-32 (quoting protest).

[15] Tenn. Const. of 1870 art. II, §§ 4-6; *see State ex rel. Lockart v. Crowell*, 631 S.W.2d 702, 704-05 (Tenn. 1982).

Other States moved towards using the federal Census's total-population count after court rulings expressed doubt as to the constitutionality of other metrics. For example, although this Court had approved an interim redistricting plan in Hawai'i that equalized the population of registered voters because it "substantially approximated" the results of equalizing total population or state citizen population, *Burns v. Richardson*, 384 U.S. 73, 96 (1966), Hawai'i stopped using a registered-voter metric after a federal court determined that its redistricting plan no longer approximated the result of using a permissible population base. *See Travis v. King*, 552 F. Supp. 554, 564-66 (D. Haw. 1982); *see also Kostick v. Nago*, 960 F. Supp. 2d 1074, 1083-84 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014) (upholding use of permanent resident population base). Likewise, Arizona stopped drawing its state senate districts based on the number of ballots cast in the previous gubernatorial election after a federal court disapproved of this metric.[16] *See Klahr v. Goddard*, 250 F. Supp. 537, 547 (D. Ariz. 1966).

B. The States' Forty-Year Partnership with the Census Bureau to Obtain Accurate Redistricting Data

The States' reliance on the Census for state legislative redistricting was formalized by Congress in 1975 through a statute that established a process for providing the States with accurate total-population data in a form readily adaptable to their

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[16] *See* Ariz. Sec'y of State, Referendum and Initiative Publicity Pamphlet 31-32 (1972).

redistricting needs.[17] *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975) (codified at 13 U.S.C. § 141(c)). Before P.L. 94-171, the States had difficulty translating Census data for redistricting purposes because the boundaries used by the Census did not always match the boundaries of political subdivisions considered by States in redistricting.[18] P.L. 94-171 resolved this problem and ensured the accuracy, usefulness, and timeliness of federal Census figures by requiring the Census to provide population data to the States broken down by the geographical boundaries that the States intend to use for redistricting.[19] *See* 13 U.S.C. § 141(c).

The P.L. 94-171 process begins "years before the [decennial] census" for most States as they prepare and submit plans describing the areas for which they will request total-population data.[20] States provide the Census with political subdivision boundaries, and suggest boundaries for smaller geographic units (known as census blocks) that are the basic units that States use in adjusting district lines.[21] Within a

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[17] *Tabulation of Population for Purposes of Apportionment of State Legislative Bodies, Hearings Before the Subcomm. on Census & Statistics of the Comm. on Post Office & Civil Service*, 93rd Cong. 8-9 (1973) ("*Tabulation Hearing*") (statement of Rep. Harold Runnels noting lack of "readily adaptable" data).

[18] S. Rep. No. 94-539, at 2-3 (1975).

[19] *See id.* at 1-3; *Tabulation Hearing*, *supra*, at 5-6 (statement of Rep. Harold Runnels).

[20] Peter S. Wattson, Nat'l Conf. of State Legislatures, *How to Draw Redistricting Plans That Will Stand Up in Court* 9-10 (2011).

[21] *See* Catherine McCully, U.S. Bureau of the Census, *Designing P.L. 94-171 Redistricting Data for the Year 2020*

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year after the decennial Census, the Bureau provides each State with total-population counts broken down by census blocks, larger units that combine census blocks (such as block groups and census tracts), and the State's requested political subdivisions.[22]

This population data include block-by-block counts of total population, as well as population by race, Hispanic origin, and voting age.[23] It does not include any counts of voters or citizens of voting age because the Census does not enumerate these populations—indeed, the Bureau declined to add a citizenship question to the questionnaire for the most recent Census in 2010.[24] As the Bureau has explained, the decennial Census does not seek information regarding citizenship or voting status because such questions would likely lower response rates (particularly from households with undocumented immigrants who may be unwilling to disclose their status) and thus reduce the accuracy of the constitutionally mandated count of "the whole number of persons in each State" that is required for congressional apportionment.[25] U.S. Const. amend. XIV, § 2.

Census, The View from the States ("*States View*") 7-9 (2014); Wattson, *supra*, at 9-10.

[22] Nat'l Conference of State Legislatures, *Redistricting Law 2010* ("*NCSL Redistricting*"), at 17 (2009).

[23] *See id.*

[24] *See* U.S. Bureau of the Census, *2010 Census Memorandum Planning Series No. 239, 2010 Census Content and Forms Design Program Assessment Report* 14 (Sept. 25, 2012).

[25] *See Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes of the Comm. on Gov'tal Affairs,*

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C. The States' Use of Census Data to Draw State Legislative Districts

Release of the Census's data under P.L. 94-171 triggers key redistricting deadlines in many States.[26] By using the total-population data and geographical files provided by the Census, States can combine or separate census blocks and other geographical units as necessary to find an acceptable district map that satisfies a multitude of constitutional, statutory, and other policy requirements.[27] Among other rules, States must equalize the population between districts; prevent racial discrimination; and pursue individual state priorities, such as preserving existing municipal boundaries and drawing compact districts.[28]

As Texas notes (Br. for Appellees 28 n.8), a few States make adjustments to the Census's total-population figures to implement political "choices about the nature of representation." *Burns*, 384 U.S. at 92. For example, two States—Hawai'i and Kansas—adjust their Census counts to exclude certain nonpermanent residents who identify with an out-of-state jurisdiction, including military personnel or students who temporarily reside in the State (and thus are counted there by the Census) but who

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99th Cong. 15-16, 22-24 (1985) (testimony and statement of John Keane, Director, Bureau of the Census).

[26] *See, e.g.*, Ala. Const. art. IX, §§ 198-200; Conn. Const. art. III, § 6.

[27] *See States View*, *supra*, at 8.

[28] *NCSL Redistricting*, *supra*, at 30-38, 52-77, 105-114.

maintain permanent homes elsewhere.[29] And four States—New York, California, Delaware, and Maryland—adjust the Census's total-population figures by reassigning incarcerated individuals from the prisons where they reside involuntarily (and are counted by the Census) to their home communities.[30] None of these adjustments, however, rests on distinctions between voters and nonvoters. Instead, they permissibly ensure that the total population included in any legislative district accurately and fairly reflects the real interests of the individuals who are part of that district's permanent community.[31]

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[29] Haw. Const. art. IV, §§ 4, 6; Kan. Const. art. X, § 1. New Hampshire's constitution authorizes its legislature to enact a statute to deduct nonpermanent residents from the Census's total-population count, N.H. Const. pt. 2d, art. 9-a, but no such statute currently exists. The constitutions of Maine and Nebraska similarly authorize deductions of noncitizens from total population if the federal Census provides those figures. Me. Const. art. IV, pt. 1, § 2, pt. 2, § 2; Neb. Const. art. III, § 5. Because the Census does not provide any counts of noncitizens, these States as a matter of practice redistrict based on the Census's enumeration of total population.

[30] N.Y. Legis. Law § 83-m(13); N.Y. Corr. Law § 71(8); Cal. Elec. Code § 21003 (requesting that independent redistricting commission adjust Census figures to deem incarcerated persons as residing at last known residence); Del. Code Tit. 29, § 804A; Md. Code, State Gov't Law § 2-2A-01. These States exclude from the population base incarcerated individuals whose home communities are outside of the State.

[31] *See* Hawai'i 1991 Reapportionment Comm'n, *Final Report and Reapportionment Plan* ("*Hawai'i Repor.*") 21-23 (1992); N.Y. Senate Standing Comm. on Crime Victims, Crime & Correction, *2009-2010 Report* 50-53 (2010).

SUMMARY OF ARGUMENT

Through experience and a close collaboration with the Census Bureau, the States have converged on their now uniform practice of equalizing the number of residents in legislative districts based primarily on the Census's total-population enumeration. Relying on the Census ensures that States have accurate, useful, and neutral total-population counts on which to base redistricting. And using the Census's tabulation of total population has provided a stable and workable standard for measuring district population that States, courts, and experts have long applied with success.

Appellants' theory that States must equalize "eligible voter" population rather than total population, if accepted by this Court, would upend state redistricting practices that have proven through experience to be fair, effective, and administrable. Rather than continuing their long reliance on Census data, States would be required to attempt redistricting based on a vague "eligible voter" metric for which they lack detailed and accurate population counts. And appellants' theory would further upend States' principled choice to redistrict based largely on total population, which helps to ensure equally fair and effective representation in state government for all residents. As this Court explained in *Burns*, such policy judgments about the nature of representation in state government should be respected.

ARGUMENT

I. Requiring States to Equalize Districts Based on "Eligible Voter" Population Would Disrupt Their Long Reliance on Well-Settled Redistricting Practices.

Appellants' argument that the States must give controlling weight to equalizing "eligible voter" population would fundamentally upend the States' redistricting practices. If this Court were to adopt appellants' constitutional theory, the States would be forced to abandon their choice to use total population in favor of an "eligible voter" metric that no existing source of data reliably provides. Moreover, because the Census does not and likely will not enumerate "eligible voters," the States would not be able to rely on the Census for this population metric, depriving them of the substantial benefits of a forty-year partnership that has provided States with detailed and reliable population data tailored to their redistricting needs. The States have a strong interest in avoiding the disruption to their settled redistricting practices that adoption of appellants' position would entail.

A. States Rely on the Census's Enumeration of Total Population to Obtain Accurate, Reliable, and Nonpartisan Population Counts for Redistricting.

Counting the population of any State is an enormous and complex exercise. Ensuring an accurate count requires immense expertise, resources, and time. The enumerator must use objectively trustworthy methods that are capable of

consistent implementation over decades, and across geographic areas that differ in demographics, population density, and other features. Those methods must produce data precise enough to enable the redistricting body to decide whether to draw a boundary down one street rather than another street one block over. And because the population count is the starting point of redistricting—affecting all other aspects of this often highly contentious process—the States have a particularly strong interest in ensuring that this threshold step is free from the risk of partisan manipulation.

The States have converged on the view that these practical concerns about obtaining reliable population counts are best satisfied by using the federal Census's enumeration of total population as the starting point for state redistricting. See *supra* at 1-9. Many States encountered intractable problems when attempting to conduct their own counts of citizens, voters, or residents. See *supra* at 2-5. The availability of the Census's data on total population resolved these practical difficulties. The resource constraints that hobbled the States' own enumeration efforts do not apply to the Census's decennial count of total population, which is constitutionally mandated and federally funded. The Census Bureau has a "'two hundred year tradition of . . . actually count[ing] people,'" *Wisconsin v. City of N.Y.*, 517 U.S. 1, 10, 18-20 (1996) (quoting Secretary of Commerce), that has given it the experience, expertise, and staff necessary to compile detailed and

accurate counts of total population in every State.[32] And the Bureau's independence from local or state politics, as well as its long-standing dedication to objective scientific methods, has kept it free of the charges of partisan manipulation that plagued the States' own efforts.[33]

The usefulness and reliability of the Census's total-population data have been further strengthened by the States' "unique collaboration" with the Bureau under P.L. 94-171. See *supra* at 5-8. The States have relied on the P.L. 94-171 process for the past four decades to obtain total-population counts that are not only widely recognized as accurate and politically neutral, but are also tailored to every State's individual redistricting needs. See *supra* at 5-7. Through this partnership, state redistricting has become inextricably intertwined with the decennial Census process as States have structured their redistricting practices and deadlines around the certainty that the Census's total-population counts will provide an administrable benchmark for drawing equally populated districts every ten years.

The States' reliance on the Census has also been approved by redistricting experts and the courts. Redistricting manuals advise that the "obvious way" for States to equalize district population "is to use

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[32] *See* U.S. Bureau of the Census, *2010 Census by the Numbers* (Mar. 2010).

[33] *See* U.S. Bureau of the Census, et al., Statement of Commitment to Scientific Integrity by Principal Statistical Agencies (n.d.).

official Census Bureau population counts."[34] Courts drawing congressional or legislative district maps—and the redistricting experts advising them—use the Census's total-population counts to measure district size. *See, e.g.*, *Hippert v. Ritchie*, 813 N.W.2d 374, 377-78, 382 (Minn. 2012). Although this Court does not mandate that States use the Census for state-level redistricting, *see Burns*, 384 U.S. at 91, it has consistently recognized that the Census provides the "best population data available" for redistricting, *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969); *see Karcher v. Daggett*, 462 U.S. 725, 739 (1983). And both this Court and the lower courts have uniformly upheld districts drawn with relatively equal numbers of total population based on the Census's enumeration. *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835, 838-39 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 737, 748-51 (1973); *see also Chen v. City of Houston*, 206 F.3d 502, 522-28 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1227-28 (4th Cir. 1996); *Garza v. County of L.A.*, 918 F.2d 763, 773-76 (9th Cir. 1990). The States have long relied on this judicial and expert consensus to draw legislative districts with equal numbers of residents.

B. States Lack Any Reliable, Administrable Method to Equalize Districts Based on "Eligible Voter" Population.

Appellants urge this Court to declare unconstitutional the States' universal use of total-population equality and to impose on the States a

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[34] Wattson, *supra*, at 6-7; *see NCSL Redistricting*, *supra*, at 10.

duty to equalize "eligible voter" population instead. If adopted by this Court, appellants' position would throw state redistricting across the country into chaos, replacing current, administrable practices with a standard that is ill-defined in theory and unworkable in practice.

1. Appellants' position would inject uncertainty at the threshold of the redistricting process by demanding that States comply with an ambiguous constitutional standard. Appellants assert that the Equal Protection Clause requires the States to equalize the number of "eligible voters" in every district but never specify what "eligible voter" means. Br. for Appellants 14-15. The statistics they offer suggest that "eligible voter" could mean a person who is registered to vote, or instead a person who is potentially able to vote but not yet registered to do so. *Id.* at 11-12; *see also* J.S. App 26a (complaint identifying "several different alternative metrics representing the number of electors or potential electors"). But appellants never specify whether the population of potential or registered voters (or some other metric, such as actual voters) is the "controlling consideration" (Appellants Br. 41) that should supplant the States' choices to use total population.

This ambiguity matters because there can be significant disparities in the estimated population of "eligible voters" depending on which metric is used. For example, appellants' own estimates of "eligible voter" population in one Texas senate district span a range from 425,000 registered voters to 574,000 citizens of voting age—a difference of nearly 150,000 people. Appellants Br. 11. Such disparities fundamentally affect any attempt to draw equally populated legislative districts that generally do not

deviate by more than ten percent. *See Brown*, 462 U.S. at 838-39.

As a result, if this Court were to adopt appellants' theory, the absence of a "clear, manageable" definition of "eligible voters" would immediately bog the redistricting process down for years of uncertainty and litigation. *See Vieth v. Jubelirer*, 541 U.S. 267, 307-08 (2004) (Kennedy, J., concurring). Indeed, appellants acknowledge that their theory leaves "implementation issues" to be litigated in the future. See Appellants Br. 44. Neither the courts nor the States should be required to abandon the "workable standards" provided by the Census's total-population count, which have proven through experience to provide an effective and administrable method for equalizing district population, for such an uncertain regime. *See Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality op.) (emphasizing need for "sound judicial and legislative administration" in redistricting).

2. Even assuming that this Court could settle on a single constitutionally required definition of "eligible voter," the States would be severely hampered in implementing any such rule due to the absence of reliable and detailed data about their populations of potential or registered voters.

a. No existing source of data provides information about the population of potential voters as robust, detailed, or useful as the total-population enumeration provided by the Census to the States through the P.L. 94-171 process. The Census Bureau does not collect information about potential voters as part of its decennial count of "the whole number of persons in each State," U.S. Const. amend. XIV, § 2.

Indeed, the Bureau has expressly declined to collect such information in the past, and it is unlikely to do so in the future due to concerns that asking for such information would interfere with its core constitutional duty to obtain an accurate count of total population. See *supra* at 7. As the Bureau has explained, questions about voting eligibility or citizenship could chill participation from individuals who "perceive[] any possibility of th[is] information being used against them" and would thus "jeopardize the overall accuracy of the population count" required by the Constitution. *Fed. for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). And even if the Bureau were willing to overlook this concern, it remains the case that any enumeration of potential voters, unlike the Bureau's enumeration of total population, would not be constitutionally required. The absence of a constitutional mandate for the Bureau to count potential voters would subject the States to continuing uncertainty about their ability to rely on the Bureau going forward.

The States are also ill-equipped to obtain an accurate count of the population of potential voters. As the States' past experience with such efforts demonstrates, obtaining precise population figures of potential voters (or any other measure of population) requires significant funding, special expertise, and a large, well-trained staff—resources that are sorely lacking at the state level. See *supra* at 2-4. And even if States could conduct such a massive undertaking, their past experience demonstrates the high risk that state-run counts could be plagued by inaccuracies and charges of improper partisan influence. See *supra* at 2-4. Requiring the States to assume the

responsibility of enumerating their population of potential voters would force them to return to the practices that many States long ago abandoned in favor of the Census's more accurate and reliable enumeration of total population.

b. Appellants and some of their *amici* suggest that reliable information about the potential voter population can be drawn from the estimates of citizen voting-age population (CVAP) in the Census Bureau's annual American Community Survey (Survey). Appellants Br. 11-12, 46; Amicus Br. for Demographers 5-10, 24-27; Amicus Br. for City of Yakima, Wash. 4-5, 19-22. As a threshold matter, CVAP is overinclusive of the actual legal-voter population because it includes voting-age citizens who may nonetheless be legally disqualified from voting due to imprisonment, prior felony conviction, mental incompetence, or some other bar. But even ignoring this disparity, the Survey estimates of CVAP simply do not provide population data as useful or reliable for redistricting as the Census's enumeration of total population.

The Survey estimate of CVAP is not an actual count of voting-age citizens at any point in time, but rather an extrapolation from a small sample (2.5%) of households, typically aggregated over several years.[35] As the Census Bureau has warned, these CVAP

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[35] U.S. Bureau of the Census, *A Compass for Understanding & Using American Community Survey Data: What General Data Users Need to Know* ("*Understanding ACS*") 1-4 (2008); *see* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 776-78 (2011).

extrapolations, even when statistically sound, simply "do[] not provide official counts of the population" with the same level of confidence as an actual enumeration.[36] Moreover, because the sample size for the Survey is so small, the Bureau cannot generate CVAP data with sufficient accuracy at the level of census blocks—the basic units of legislative map-making—and only recently (in 2011) has been able to generate estimates at the level of larger geographic units such as block groups and census tracts.[37] Thus, aside from being an estimate, CVAP figures simply do not exist at the level of granularity that the States require for purposes of drawing state legislative districts.

Additional uncertainty comes from the fact that there is no single CVAP data set that is the authoritative estimate of the population of voting-age citizens. The Survey produces CVAP figures in three separate data sets encompassing survey responses from the past one, three, or five years, each of which provides different CVAP estimates with different margins of error.[38] And the Bureau updates these three data sets every year, meaning that a single year could be the subject of multiple, overlapping CVAP estimates covering different time periods. (Appellants themselves rely on three different five-year CVAP data sets in their brief. See Appellants Br. 11-12.)

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[36] *Understanding ACS*, *supra*, at 4.

[37] Persily, *supra*, at 776.

[38] David R. Hanna, Texas Legislative Council, Using Citizenship Data for Redistricting 15-16 (n.d.).

The multiplicity of relevant CVAP data raises many implementation issues. One is that the mere availability of choice raises the risk of partisan manipulation, particularly in States where the legislature controls the redistricting process. As several members of this Court have observed, a legislative body's ability to "select among various estimation techniques" for population risks handing "the party controlling" the redistricting process "the power to distort representation in its own favor." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring). Moreover, courts may have difficulty "reviewing estimation techniques in the future" when disputes arise, "to determine which of them *so obviously* creates a distortion that it cannot be allowed." *See id.* at 349. That is particularly true when, as here, there is no actual count of voting-age citizenship population to serve as a benchmark, leaving courts the unenviable task of adjudicating abstruse disputes between experts over the validity of various statistical techniques. *Id.* States should not be forced to replace the Census's "genuine enumeration"—perhaps "the most accurate way of determining population with minimal possibility of partisan manipulation"—with methods so open to manipulation and uncertainty. *See id.* at 348-49.

Notwithstanding these issues, appellants and their *amici* assert that the Survey's CVAP estimates are sufficiently reliable because States and courts use these estimates in litigation under § 2 of the Voting Rights Act (VRA) to measure voting power for the purpose of evaluating majority-minority districts. *See, e.g.*, Amicus Br. for Demographers 15-20. But CVAP estimates are not used as the dispositive

measure of the number of voters or their voting power in the context of § 2, a statutory provision with its own unique set of legal criteria. Rather, CVAP estimates are simply one piece of a larger and more robust statistical inquiry into whether changes to a redistricting plan dilute minority voting strength in violation of § 2. *See Thornburg v. Gingles*, 478 U.S. 30, 43-51 (1986). Experts usually consider CVAP estimates alongside a broad spectrum of other evidence—including statistical analyses of election results, voter turnout rates, the presence of racially polarized voting, projections of population growth, and lists of Spanish-surname registered voters—to help the States and courts determine whether minority voters retain the opportunity to elect a candidate of their choice in a specific majority-minority district. *See, e.g.*, *Sanchez v. Colorado*, 97 F.3d 1303, 1315-22 (10th Cir. 1996); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 732 (N.D. Tex. 2009); *Reyes v. City of Farmers Branch*, No. 07-cv-900, 2008 WL 4791498, at *7-*19 (N.D. Tex. Nov. 4, 2008), *aff'd*, 586 F.3d 1019 (5th Cir. 2009). Appellants and their *amici* propose to use CVAP in a very different way in the redistricting context: as the single dispositive measure of "eligible voter" population for thousands of legislative districts nationwide. Although CVAP may be useful for the specific purpose that it currently serves, there is no evidence that it would remain equally reliable when wrenched from its current context and elevated to the status of a dispositive and constitutionally required metric.

c. Appellants' other metric for "eligible voters"—registered voters—is equally fraught with practical difficulties. At least one State, North Dakota, does not require voter registration at all, making this

metric unavailable there.[39] And in many States, registered-voter rolls are maintained not by any central state agency, but rather by local election boards. Such decentralized processes to gather voter data proved problematic in the past when several States attempted to use counts of registered voters to draw legislative district lines. See *supra* at 2-4. If States were required to rely on this information for redistricting, they would have to fundamentally reform their voter-registration systems to replicate the level of precision and reliability currently provided by the Census's enumeration of total population.

Even if the States could find a way to make workable the process of collecting data about registered voters, using such data would raise additional concerns. As this Court has explained, the use of registered-voter data for state legislative redistricting raises the risk that the population figures controlling the distribution of power for as long as ten years could be subject to "sudden and substantial" fluctuations based on partisan factors that drive voter registration, such as "peculiarly controversial election issue[s] [or] a particularly popular candidate." *Burns*, 384 U.S. at 93 (quotation marks omitted). Indeed, eleven States that authorize voters to register on the day of the election itself often experience such sudden and substantial

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[39] N.D. Sec'y of State, North Dakota....The Only State Without Voter Registration (July 2015).

increases in the population of registered voters.[40] Moreover, as this Court further reasoned in *Burns*, tying the population base for redistricting to registration increases the risk that "those in political power" will manipulate redistricting for political gain, such as by inflating or suppressing voter registration numbers in certain areas to influence the population count. 384 U.S. at 92-93. As a result of these risks, this Court has warned that redistricting based on registered voters is likely to be invalid unless the result approximates that which would obtain from using a different, "permissible population basis." *Id.*

3. Appellants' response to the enormous practical problems posed by their position is to suggest that such "implementation issues" can be addressed later. Appellants Br. 44. But States would suffer immediate and serious consequences if they are required to redistrict based on "eligible voters" rather than total population. Existing legislative maps in place since the 2010 redistricting cycle could be challenged in courts across the country. States would suddenly face the prospect of counting "eligible voters" without knowing whether to enumerate registered voters, citizens of voting age, or another voter population (such as actual voters). And even if States or courts could settle on a standard, States would not be able to redistrict immediately based on "eligible voter" population because gathering accurate and objective population counts takes "years of research, planning,

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[40] Nat'l Conference of State Legislatures, *Same Day Voter Registration* (June 2, 2015); Demos, *What Is Same Day Registration? Where Is It Available?* (2014).

testing, and development of methods and infrastructure."[41] This delay and uncertainty would likely throw upcoming state elections into turmoil.

Indeed, the level of chaos that would ensue if this Court were to accept appellants' theory would be far greater than the disruption that followed the Court's rejection of geographically based redistricting in *Reynolds* and other cases. When *Reynolds* was decided, States had the Census's total-population counts readily available to implement the population-based redistricting that this Court required. Many States with bicameral legislatures were already using the Census enumeration to redistrict based on population for at least one of their two legislative bodies.[42] And States were already using the Census's data on total population for federal redistricting. Here, by contrast, no State currently uses "eligible voter" population, and, as discussed above, there is no readily available and reliable data that could be used to redistrict on this basis.

Appellants also suggest that many States could avoid any practical problems because the distributions of people and "eligible voters" in a State might coincide. *See* Appellants Br. 15. But there is no way for a State to make that determination when they do not have reliable data on the population of "eligible voters." And appellants' suggestion that total population and "eligible voter" population might coincide is speculation at best. The distribution of "eligible voters" (however defined) is often uneven in

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[41] U.S. Bureau of the Census, *About the Census* (Sept. 2015).

[42] *N.Y. Report*, *supra*, at 85-91.

many States—including Texas, New York, California, and Alaska—because certain areas tend to have larger numbers of nonvoters than others. For example:

- Within New York City, one Brooklyn state senate district has a much larger proportion of children (approximately 30% of its total population) than one Manhattan senate district (approximately 9% of its total population) because the Brooklyn district is more residential and home to religious communities that often have many children.[43]
- In Alaska, rural legislative districts often have substantially higher percentages of children than most urban districts—*e.g.*, the population in two rural house districts is approximately 37% children compared with less than 20% in several urban districts—because the Native Alaskan communities living in rural districts often have large families and experience an exodus of voting-age adults moving to cities for educational and employment opportunities.[44]
- In California, immigrant populations are more concentrated in certain parts of the

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[43] *See* N.Y. Legis. Task Force on Demographic Research & Reapportionment, Senate's Dep't of Justice Submission, Ex. 9 (2012) (Districts 17, 27).

[44] Alaska Redistricting Bd., 2013 Proclamation District Population Analysis (2013).

> State, such as Los Angeles and the Central Valley, and the number of U.S. citizens can be as much as 40% higher in some districts than others.[45]

The serious practical problems posed by appellants' constitutional theory are thus immediate and unavoidable. This Court should not disrupt the States' universal practice of relying on the Census count of total population and trigger these consequences throughout the nation.

II. The States' Use of a Total-Population Base Is Consistent with a Policy of Providing Fair and Effective Representation to Voters and Nonvoters Alike.

In *Burns*, this Court recognized that the population base used by a State for legislative redistricting involves fundamental "choices about the nature of representation" that are entitled to respect under any equal protection analysis. 384 U.S. at 92. Here, the States' universal practice of including nonvoters in the total population considered for redistricting is consistent with the principle that "'equal representation for equal numbers of people'" ensures the "fair and effective representation" of all persons served and affected by state government—including both voters and nonvoters. *Reynolds*, 377 U.S. at 559-60, 565 (quoting *Wesberry v. Sanders*, 376 U.S.1,18 (1964)).

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[45] David G. Savage & David Lauter, *Supreme Court Redistricting Case Could Reduce Latinos' Political Clout*, L.A. Times, May 26, 2015.

1. Equalizing total population between legislative districts promotes the equal treatment of voters by state legislatures. Appellants' contrary view hinges on an overly narrow and abstract theory of "voter equality" that the States are not obligated to accept. Appellants contend that the Equal Protection Clause compels States to ensure a type of formal equality between voters in the voting booth by giving each potential voter the same relative power to help select a representative. Appellants Br. 19, 41, 46-49. But voters' interest in equal treatment does not end in the voting booth: they also have a strong interest in ensuring that the legislator they elect has the same ability to fairly and effectively represent their interests as other legislators have for their constituents. *Reynolds*, 377 U.S. at 565-66.

As the States' experience demonstrates, however, voters receive fundamentally *unequal* representation when legislative districts have disparate total populations because different legislators must serve and wield the same amount of governmental influence on behalf of different numbers of people. Although each voter in a more-populated district may formally have the same proportional power to elect a representative as a voter in a less-populated district with the same number of voters, the representative from the more-populated district will be over-burdened in the district and underpowered in the legislature compared to her peers. The result is a practical diminution of the power of every vote in more-populated districts. The States' decision to avoid this type of voter inequality by drawing political boundaries based on total-population figures is a reasonable one that this Court has said is

constitutionally permissible and subject to deference. *See Burns*, 384 U.S. at 92.

2. Voters' interest in equally fair and effective representation is affected by the total population in legislative districts because legislators represent all constituents in the districts they serve regardless of whether any particular individual can or did vote. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality op.); *Daly*, 93 F.3d at 1226. As a result, voters are treated unequally in two concrete ways if they reside in a district with a much larger number of residents than another district. *First*, because legislators in practice devote considerable time and effort to "providing services and information" to "both voters and nonvoters," *Calderon v. City of L.A.*, 4 Cal. 3d 251, 259 (1971), voters in more-populated districts will have less ability to voice their concerns to their representative, who will have to divide her time and efforts among many more people than a representative from a less-populated district. *See Kirkpatrick*, 394 U.S. at 531 (recognizing that "[e]qual representation for equal numbers of people" prevents "diminution of access to elected representatives"); *Garza*, 918 F.2d at 774-75 (recognizing that "basing districts on voting population . . . would dilute the access of voting age citizens in that district to their representative").

Second, although the legislator from a more-populated district must represent and meet the needs of a larger group of individuals, she has no greater voting power in the governing body to affect state policy than the legislator from a less-populated district, creating a mismatch between the legitimate interests of her constituents (including voters) and her ability to address those concerns. *See Bd. of*

Estimate v. Morris, 489 U.S. 688, 693-94, 699 (1984) (noting that voters are "shortchanged" if they receive "a smaller share of representation than . . . [voters] in the smaller districts"). That disparity gives rise to the substantial risk that the voters in more-populated districts will be underserved in practice because the distinct needs and concerns of their district—as a reflection of the greater numbers of their residents—were ignored or subordinated in drawing state legislative lines.

The States' historical experience demonstrates how voters can receive unequal treatment from the legislature as a result of disparities in total population. Prior to this Court's decision in *Reynolds*, many States contained districts with substantial population disparities as urban and suburban areas experienced rapid population growth without receiving a proportional increase in representation.[46] As a result, voters in densely populated districts lacked the representation they needed to ensure that state government adequately responded to the distinct problems and policy concerns that their districts faced. For example, voters (and nonvoters) in cities and suburbs faced "overcrowded schools, hospitals, and jails, dilapidated housing, and congested roads."[47] And they grappled with policy concerns that greatly affected more urban, populous areas, such as

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[46] Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1058-65 (1958).

[47] J. Douglas Smith, *On Democracy's Doorstep* 43 (2014).

labor and employment issues and pollution control.[48] But without legislative power reflective of the total numbers of people affected by these problems, representatives serving urban and suburban districts struggled to set state policies or procure sufficient resources to benefit their constituents.[49] For example:

- In Tennessee, more than 80% of the House districts deviated from an ideal total population by more than 25%.[50] Meanwhile, 23 counties received 57.9% more state-aid funds than they would have received based on a per-capita division of funds.[51]
- In Colorado, schools serving 90,000 children in Denver received $2.3 million in state funding while schools serving 18,000 children in another county received $2.4 million.[52]
- In Kentucky, 2¢ of every $1 of gasoline tax went to maintaining roads in less-

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[48] *Id.* at 48; *see* U.S. Advisory Comm'n on Intergovernmental Relations, *Apportionment of State Legislatures* 28 (1962).

[49] Smith, *supra*, at 42-43, 48, 61; *see also* Stephen Ansolabehere & James M. Snyder Jr., *The End of Inequality, One person, One Vote and the Transformation of American Politics* 68-74 (2008).

[50] Bureau of Public Admin., Univ. of Tenn., Memorandum on Legislative Apportionment in Tennessee 5 (1961).

[51] Br. for Appellants 13, *Baker v. Carr*, 369 U.S. 186 (1962), 1961 WL 64817.

[52] Richard L. Strout, *The Next Election Is Already Rigged*, Harper's Magazine 35, 37 (Nov. 1959).

populous areas without any similar tax allocation for roads in populous urban areas.[53]

- In California, about one-third of the State's total population controlled more than two-thirds of the representation in the State Senate, and the population of a single district in Los Angeles was 450 times the size of the population of a rural district in the eastern part of the State.[54]

Indeed, before this Court required States to equalize district population, legislators' inability to serve adequately the distinct and increasing concerns of more-populated districts triggered severe disillusionment with state government. For example, in Rhode Island, the lack of proportionate representation to match rapid population growth in industrialized areas contributed to a rebellion in 1841, through which the people bypassed the legislature and ratified by referendum a new constitution that was drafted by constitutional-convention delegates who had been "equitably apportioned according to population."[55] Later, in New York, the lack of government attention to problems facing more-populous suburbs caused Long Island residents to stage a protest during which they dumped barrels of

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[53] Nat'l Mun. League, *Compendium on Legislative Apportionment*, at Kentucky 4 (2d ed. 1962).

[54] *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964), *aff'd*, 318 U.S. 415 (1965).

[55] Patrick T. Conley, Jr., *One Town, Two Voters; One Man, One Vote: A History of Legislative Apportionment in Rhode Island*, R.I. Bar J. 18, 19-20 (May 1986).

tea into the water and decried "taxation without representation."[56] And a federal commission studying intergovernmental relations in 1955 concluded that the "power and influence" of state government was declining in part because residents of urban areas were seeking public funding and policy solutions from the federal government, which was more equitably apportioned based on total population, after experiencing years of neglect from their state legislatures.[57]

The problems that arose when some legislators had to serve many more people than other legislators would not have been cured by equalizing the number of voters in the districts instead of equalizing the total populations. Even if two districts have the same number of "eligible voters," the fact that one district has a greater population of school-age children, ex-felons, recent immigrants, or other nonvoters will naturally lead to additional issues that the less-populated district does not face, and additional work for that district's representative that the representative from the less-populated district does not have to undertake. Equalizing districts by total population ensures that the legislature is appropriately responsive to the distinct concerns that all residents, including but not limited to voters, face in densely populated areas.

3. The States' experience thus demonstrates that voter equality is protected by drawing state legisla-

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[56] Smith, *supra*, at 49.

[57] *See* U.S. Advisory Comm'n on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* 36-40 (1955).

tive lines to take into account everybody affected and served by state government, including nonvoters. This Court's precedents support this broader principle of voter equality. It was in the context of deep discontent over inequalities in the distribution of representation and public resources that the Court ruled in favor of disaffected voters in *Wesberry* and *Reynolds*. In both of these decisions, this Court recognized that disparities in total population were a source of voter debasement. For example, in *Wesberry*—where one Georgia congressional district contained 823,680 people and other districts contained an average of 394,312 people—the Court concluded that "inequality of population" under which one representative "represent[ed] from two to three times as many people" as other representatives, "contract[ed] the value of some votes and expand[ed] that of others." 376 U.S. at 2, 7. In *Reynolds*, after emphasizing the representational inequalities arising from Alabama's distribution of legislators—under which, for example, one state senator represented 600,000 people while another senator represented 15,417 people—the Court determined that providing the "same number of representatives to unequal numbers of constituents" devalued the votes in more-populated districts, 377 U.S. at 546, 562-63. And later, in *Morris*, the Court reaffirmed that a voter is "shortchanged . . . if he may vote for one representative" while "the voters in another district" with a population "half the size also elect one representative." 489 U.S. at 698.

To be sure, this Court's decisions also refer at times to inequalities between voters in their proportional power to elect a candidate. *See* Appellants Br. 22-28. *See, e.g., Hadley v. Junior Coll.*

Dist., 397 U.S. 50, 57 (1970) (apportionment scheme "systematic[ally] discriminat[ed] against voters" by allocating same number of trustees to districts with wide population ranges); *Gray v. Sanders*, 372 U.S. 368, 371-73, 379 (1963) (unit voting system gave more weight to votes from less-populous, rural areas than to votes from more-populous, urban areas). But in these cases, the Court was not faced with the question of precisely how to measure voter equality because the electoral practices or legislative districts challenged in those cases were unequal under any theory. If anything, this Court's recognition that voters were harmed in multiple ways only reinforces the States' prerogative to decide which principle of voter equality to prioritize in making fundamental "choices about the nature of representation" in their governments. *Burns*, 384 U.S. at 92.

Federal apportionment and redistricting further support the principle that voter equality is preserved if legislators serve equally populated districts. By dividing House representatives among the States according to their respective numbers of inhabitants at a time when the franchise was largely restricted to white, male property owners, the Framers set "equal representation for equal numbers of people"—rather than equal numbers of voters—as the "high standard of justice and common sense" in representational government. *Wesberry*, 376 U.S. at 18; *see* U.S. Const. art. I, § 2. The States later reaffirmed this high standard of equal representation by rejecting proposals to reapportion House representatives based on voters and ratifying the Fourteenth Amendment's command to reapportion based on the "whole number of persons in each State." *See* Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

Appellants contend that federal apportionment and redistricting are wholly inapposite to the constitutionality of state legislative redistricting (Appellants Br. 42-44), but this Court has said otherwise, recognizing that "[t]he equal protection guarantee of 'one person, one vote' extends not only to congressional districting plans," but also "to state legislative districting," *Morris*, 489 U.S. at 692. Appellants' position would create an indefensible tension between the rules governing congressional apportionment and those governing state legislative apportionment. Nothing in the Court's precedents or the Equal Protection Clause remotely suggests that the States are constitutionally forbidden from achieving in state government the same basic level of equality of representation that is constitutionally required in the federal government.

Finally, the adjustments that several States make to the Census's total-population data highlight the States' continuing efforts to preserve voter equality by drawing district lines that reflect all those served and affected by state government. All States begin that process with a total-population count that includes voters and nonvoters alike. Several States have recognized that further refinements may be necessary to preserve equality for voters (and nonvoters) who live in particular districts and thus have strong interests in the concerns of those communities and the representation that those districts receive. For example, four States have determined that incarcerated individuals retain their residences in and legitimate ties to their home communities rather than in the prisons where they reside involuntarily and in isolation from the outside community. See *supra* at 9. These States thus count

incarcerated individuals in their home communities rather than in their prison districts to reflect the States' judgment as to the actual distribution of people who are interested in and represented by the legislators from those districts. And two States have determined that nonpermanent-resident military personnel and students who maintain their permanent homes in a different State have chosen to remain interested primarily in the policies and concerns of another State's government. See *supra* at 8-9. These States thus exclude temporary residents from the redistricting base due to the judgment that the remaining population better reflects the actual population of residents who are most connected to and interested in that State's government.

4. Equalizing total population between state legislative districts thus ensures voter equality in a broader sense than recognized by appellants here. Given this feature of the States' current redistricting practices, appellants' argument fails on its own terms. Moreover, total-population equality also serves the States' interest in recognizing and respecting nonvoters. Although appellants give little weight to this consideration, and indeed suggest that it is irrelevant to the issue presented here (Appellants Br. 39-40), a State's decision to give weight to the presence of nonvoters is also entitled to respect as part of its "choice[] about the nature of representation," *Burns*, 384 U.S. at 92. For example, in California, the voters specifically repealed a prior regime that had prohibited counting "persons who are not eligible to become citizens of the United

States" as part of the population of any district.[58] Likewise, Hawai'i stopped redistricting based on registered voters in part because the concept of "ohana" or family is important in Hawai'ian culture and excluding children from representation was contrary to this tradition.[59]

Many state residents "cannot or do not cast a ballot," *Calderon*, 4 Cal. 3d at 258-59, including children, adults not yet registered to vote, the mentally incompetent, noncitizens, people with past felony convictions, and incarcerated individuals. States may have legitimate reasons to deny these residents the ability to vote. But those reasons do not compel the States to go even further and exclude these populations from the representational process altogether, especially when this Court has upheld the States' right to make a different policy judgment. *See Burns*, 384 U.S. at 92. Like voters, many nonvoters make valuable contributions to state government by paying taxes and contributing to the community in other ways, such as serving in the military, running local businesses, and participating in the labor force. Counting these nonvoters acknowledges their contributions and recognizes that, like voters, they have legitimate concerns that ought to be considered by state legislatures and representatives. By contrast, requiring States to disregard these nonvoters, as appellants seek, would undermine the States' efforts to treat nonvoters equally by including

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[58] Cal. Const. of 1879, art. IV, § 6; *see* Cal. Sec'y of State, California Ballot Pamphlet–Primary Election, June 3, 1980, at 20-21 (1980).

[59] *Hawai'i Report*, *supra*, at 22.

them in the population base—an effort consistent with the rule that the Equal Protection Clause applies to individuals without regard to their ability to vote. *See Pickett v. Brown*, 462 U.S. 1 (1983) (Equal Protection Clause applies to children); *Plyler v. Doe*, 457 U.S. 202 (1982) (same for noncitizens). The Equal Protection Clause thus does not require the States to give unequal treatment to nonvoting residents whom they have chosen to include in the population base for state legislative redistricting.

CONCLUSION

The judgment of the district court should be affirmed.

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Constitutional and Statutory Provisions on Using Total Population for Redistricting*

State	*Law*	*Legislative Redistricting Base*
Alabama	Const. art. IX, §§ 197-201	House: Census total population Senate: Total population, uses Census
Alaska	Const. art. VI, §§ 1-4, 6, 10	House: Census total population Senate: Census total population
Arizona	Const. art. IV, pt. 2, § 1; Ariz. Rev. Stat. § 16-1103	House: Census total population Senate: Census total population
Arkansas	Const. art. VIII, §§ 2-4	House: Census total population Senate: Total population, uses Census
California	Const. art. XXI, §§ 1-2; Cal. Elec. Code § 21003	Assembly: Total population, uses Census Senate: Total population, uses Census (*Adjusts residence for incarcerated individuals*)

* "Census total population" means the State's law directs use of the Census Bureau's enumeration. "Uses Census" means the State in practice uses the Census Bureau's enumeration.

State	*Law*	*Legislative Redistricting Base*
Colorado	Const. art. V, §§ 46-48	House: Total population, uses Census Senate: Total population, uses Census
Connecticut	Const. art. III, §§ 5-6	House: Unspecified, uses Census Senate: Unspecified, uses Census
Delaware	Const. art. II, §§ 2, 2A; Del. Code tit. 29, §§ 804-805, 804A	House: Census total population Senate: Census total population (*Adjusts residence for incarcerated individuals*)
District of Columbia	D.C. Code § 1-1011.01	Census total population
Florida	Const. art. III, §§ 16, 21; art. X, § 8; Fla. Stat.§ 10.11	House: Total population, uses Census Senate: Total population, uses Census
Georgia	Const. art. III, § 2, ¶ II	House: Unspecified, uses Census Senate: Unspecified, uses Census

State	*Law*	*Legislative Redistricting Base*
Hawaii	Const. art. IV, §§ 4-6; Haw. Rev. Stat. § 25-2	Permanent residents Permanent residents (*Census total population adjusted to exclude nonpermanent resident military and students*)
Idaho	Const. art. III, §§ 2, 4-5; Idaho Code § 72-1506	House: Census total population Senate: Census total population
Illinois	Const. art. IV, §§ 1-3;	House: Total population, uses Census Senate: Total population, uses Census
Indiana	Const. art. IV, §§ 2, 5	House: Census total population Senate: Census total population
Iowa	Const. art. III, §§ 34-35; Iowa Code §§ 42.2, 42.4	House: Census total population Senate: Census total population
Kansas	Const. art. X, § 1; Kan. Stat. §§ 11-301 to -305	Permanent residents Permanent residents (*Census total population adjusted to exclude nonpermanent resident military and students*)

State	*Law*	*Legislative Redistricting Base*
Kentucky	Const. § 33; Ky. Rev. Stat. § 5.010	House: Total population, uses Census Senate: Total population, uses Census
Louisiana	Const. art. III, § 6	House: Census total population Senate: Census total population
Maine	Const. art. IV, pt. 1, §§ 2-3; art. IV, pt. 2, §§ 1-2	House: Uses Census total population Senate: Uses Census total population[a]
Maryland	Const. art. III, §§ 2-5; Md. Code State Gov't § 2-2A-01	House: Total population, uses Census Senate: Total population, uses Census (*Adjusts residence for incarcerated individuals*)
Massachusetts	Const. art. CI, §§ 1-2; arts. CIX, CXVII, CXIX	House: Census total population Senate: Census total population

[a] Me. Const. art. IV, pt. 1, § 2 and pt. 2, § 2 provide for dividing representatives and senators based on "the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census." Because the Census does not provide any counts of noncitizens, Census total population is used in practice.

State	*Law*	*Legislative Redistricting Base*
Michigan	Const. art. IV, §§ 2-3; Mich. Comp. Laws § 4.261	House: Total population, uses Census Senate: Census total population
Minnesota	Const. art. IV, §§ 2-3	House: Total population, uses Census Senate: Total population, uses Census
Mississippi	Const. art. XIII, § 254; Miss. Code § 5-3-99	House: Census total population Senate: Census total population
Missouri	Const. art. III, §§ 2, 5, 7, 10	House: Census total population Senate: Census total population
Montana	Const. art. V, §§ 2, 14;	House: Total population, uses Census Senate: Total population, uses Census
Nebraska	Const. art. III, § 5	Unicameral: Uses Census total population[b]

[b] Neb. Const. art. III, § 5 provides for dividing districts based on "population excluding aliens, as shown by the next preceding federal census." Census total population is used in practice.

State	*Law*	*Legislative Redistricting Base*
Nevada	Const. art. IV, § 5; art. XV, § 13	Assembly: Census total population Senate: Census total population (*Constitution authorizes state-conducted census if necessary; uses Census*)
New Hampshire	Const. pt. 2, arts. 9, 9-a, 11, 26	House: Census total population Senate: Total population, uses Census (*Legislature authorized to adjust for nonpermanent residents but no such statute currently in force*)
New Jersey	Const. art. IV, § 2, ¶¶ 1, 3; art. IV, § 3	Assembly: Census total population Senate: Census total population
New Mexico	Const. art. IV, § 3	House: Unspecified, uses Census Senate: Unspecified, uses Census

State	*Law*	*Legislative Redistricting Base*
New York	Const. art. III, §§ 3-5, 5-a;[c] Legis. Law § 83-m Corr. Law § 71 State Law §§ 120, 123	Assembly: Census total population Senate: Census total population (*Adjusts residence for incarcerated individuals*)
North Carolina	Const. art. II, §§ 2-5	House: Total population, uses Census Senate: Total population, uses Census
North Dakota	Const. art IV, §§ 1-2; N.D. Cent. Code § 54-03-01.5	House: Total population, uses Census Senate: Total population, uses Census
Ohio	Const. art. XI, §§ 1-4, 6, 9-0	House: Census total population Senate: Census total population
Oklahoma	Const. art. V, §§ 9A, 10A, 11A	House: Census total population Senate: Census total population

[c] N.Y. Const. art. III, §§ 3-5 refer to dividing districts based on "inhabitants, excluding aliens," but a constitutional amendment replaced this phrase with the term "the whole number of persons," *id.* § 5-a, abrogating any requirement to exclude aliens.

State	*Law*	*Legislative Redistricting Base*
Oregon	Const. art. IV, §§ 6-7; Or. Rev. Stat. § 188.010	House: Total population, uses Census Senate: Total population, uses Census
Pennsylvania	Const. art. II, §§ 16-17	House: Total population, uses Census Senate: Total population, uses Census
Puerto Rico	Const. art. III, §§ 2-4	House: Total population, uses Census Senate: Total population, uses Census
Rhode Island	Const. art. VII, § 1; art. VIII, § 1	House: Total population, uses Census Senate: Total population, uses Census
South Carolina	Const. art. III, §§ 3-6	House: Total population, authorizes adoption of Census as state enumeration, uses Census Senate: Total population, authorizes adoption of Census as state enumeration, uses Census
South Dakota	Const. art. III, § 5	House: Census total population Senate: Census total population

State	*Law*	*Legislative Redistricting Base*
Tennessee	Const. art II, § 4-5, 6; Tenn. Code §§ 3-1-102–103	House: Total population, uses Census Senate: Total population, uses Census
Texas	Const. art. III, §§ 25-26, 28	House: Census total population Senate: Unspecified, uses Census
Utah	Const. art. IX, § 1; Utah Code §§ 36-1-101.5, 36-1-201.5	House: Census total population Senate: Census total population
Vermont	Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902	House: Census total population Senate: Census total population
Virginia	Const. art. II, § 6; art. IV, § 2-3	House: Total population, uses Census Senate: Total population, uses Census
Washington	Const. art. II, § 43; Wash. Rev. Code § 44.05.090	House: Census total population Senate: Census total population[d]

[d] Wash. Const. art. II, § 43 provides that "nonresident military personnel" shall be excluded from the population base, which refers to military personnel living outside of the United States.

State	*Law*	*Legislative Redistricting Base*
West Virginia	Const. art. VI, §§ 4, 6-7, 10	House: Total population, uses Census Senate: Census total population
Wisconsin	Const. art. IV, § 3	Assembly: Total population, uses Census Senate: Total population, uses Census
Wyoming	Const. art. III, §§ 3, 48	House: Census total population Senate: Census total population